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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN FRANCISCO DIVISION

11 SONOS, INC.,

12 Plaintiff,

13 vs.

14 GOOGLE LLC,

15 Defendant.

Case No. 3:21-cv-07559-WHA

**REPLY IN SUPPORT OF GOOGLE  
LLC'S MOTION TO DISMISS SONOS'S  
SECOND AMENDED COMPLAINT**

Date: February 24, 2022

Time: 8:00 a.m.

Location: Courtroom 12, 9<sup>th</sup> Fl.

Judge: Hon. William Alsup

Second Amended Complaint Filed: February  
23, 2021

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1 **I. INTRODUCTION**

2 To survive Google’s Motion to Dismiss, Sonos attempts to manufacture the requisite  
 3 elements of willful and indirect infringement after the fact. Sonos admits that a plaintiff cannot  
 4 plead willful infringement based on the filing of the complaint alone. Nevertheless, Sonos contends  
 5 that this case is different because (1) for the ’033 and ’966 patents, Sonos sent Google what it called  
 6 a “courtesy copy” of the complaint less than 24 hours before the complaint was filed, and (2) for the  
 7 ’885 patent, Sonos provided a copy of its proposed amended complaint in connection with the Court-  
 8 mandated meet and confer on Sonos’s motion for leave to amend.<sup>1</sup> Thus, the questions presented  
 9 by Sonos’s Opposition are whether a plaintiff can satisfy the knowledge requirement for pleading  
 10 willful infringement by providing a complaint (1) a day before filing it or (2) during a required meet  
 11 and confer requesting leave to add a patent to the case. Courts in other districts have squarely  
 12 rejected this type of gamesmanship and this Court should do the same. And even putting aside its  
 13 failure to plead pre-suit knowledge, Sonos’s willfulness allegations fail for a second independent  
 14 reason, namely Sonos’s failure to plead egregiousness. Sonos’s assertion that egregiousness is not  
 15 a requirement of pleading willfulness ignores recent decisions from this Court holding otherwise.

16 Sonos’s indirect infringement allegations should also be dismissed. Sonos asserts that some  
 17 cases hold that a complaint can satisfy the knowledge requirement for pleading post-suit indirect  
 18 infringement, a fact that Google acknowledged in its Motion. But Sonos does not grapple with the  
 19 fact that other cases, including those in this District, have sided with Google and prohibited the  
 20 complaint from creating a cause of action for indirect infringement. Google’s Motion showed that  
 21 the reasoning and logic behind those cases are sound, and Sonos’s Opposition fails to rebut them.

22 While Sonos’s indirect infringement allegations should be dismissed for lack of pre-suit  
 23 knowledge alone, Sonos’s Opposition also does not explain away the additional defects afflicting  
 24 its indirect infringement allegations. On specific intent, Sonos vaguely alleges that Google  
 25 encouraged its customers to directly infringe the ’033, ’966, and ’885 patents by advertising its  
 26

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27 <sup>1</sup> Recognizing the drawbacks of these arguments, Sonos relies on materials outside the pleadings  
 28 to suggest that Google should have been on notice through prior licensing discussions that “did not  
 specifically identify the ’033, ’966, and ’885 Patents.” Dkt. No. 144 (“Opp.”) at 7.

1 products, supplying those products to consumers, and instructing consumers how to use those  
 2 products. But Sonos fails to provide any factual allegations explaining how such actions induce a  
 3 customer to infringe. The SAC therefore does not give rise to a plausible inference of specific intent.  
 4 As to contributory infringement, Sonos simply asserts that in these circumstances, the ordinary  
 5 pleading rules do not apply, and a formulaic recitation of claim elements is all that is required. This  
 6 argument is plainly contrary to law, and should be rejected.<sup>2</sup>

## 7 **II. ARGUMENT**

### 8 **A. Sonos's Willfulness Allegations Should Be Dismissed**

9 Sonos's failure to adequately allege pre-suit knowledge and egregiousness compels the  
 10 dismissal of its willfulness claims.

#### 11 **1. Sonos Has Not Adequately Pled Pre-Suit Knowledge**

12 Sonos claims in its introduction that "the law in this district is clear that claims for post-  
 13 filing willfulness . . . can be predicated on the notice given by an initial complaint." Opp. at 1. But  
 14 Sonos does not identify case law supporting this allegedly "clear" proposition of law, and elsewhere  
 15 appears to acknowledge that to state claim for willfulness it must show that Google had knowledge  
 16 of the asserted patents pre-suit. *Id.* at 8. As Google showed in its Motion, cases from this district  
 17 (and this Court) require that plaintiffs allege pre-suit notice in order to plead willful infringement.  
 18 Dkt. No. 138 ("Mot.") at 3. In other words, notice given by the initial complaint is *not* sufficient.

19 Sonos did not provide Google with pre-suit notice of the '033, '966, and '885 patents.  
 20 Although Sonos devotes over three pages of its Opposition to describing correspondence between  
 21 the parties from 2016 to 2019 about different, non-asserted patents,<sup>3</sup> Sonos acknowledges that "this  
 22

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23 <sup>2</sup> In a footnote, Sonos suggests that Google's Motion is "untimely and improper" under Rule  
 24 12(b)(6) with respect to the '033 and '966 patents because Google "answered Sonos's allegations."  
 25 Opp. at 11 n.3. Sonos is wrong. And in any event, the Court does have the discretion to treat  
 26 Google's Rule 12(b)(6) motion as a Rule 12(c) motion. *Dodge v. Author Sols., LLC*, No. C 14-  
 00518 LB, 2014 WL 2584813, at \*2 n.4 (N.D. Cal. June 9, 2014); *see also Finjan, Inc. v. Juniper*  
*Network, Inc.*, No. C 17-05659 WHA, 2018 WL 4181905, at \*2 (N.D. Cal. Aug. 31, 2018).

27 <sup>3</sup> In addition to being irrelevant, Sonos's reliance on these exhibits is improper. None of these  
 28 materials appear in Sonos's SAC (Dkt. 51), and "[g]enerally, district courts may not consider  
 materials outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6)." *Cohen v. Apple Inc.*, No. C 19-05322 WHA, 2020 WL 619790, at \*1 (N.D. Cal. Feb. 10, 2020)

1 correspondence did not specifically identify the '033, '966, and '885 Patents.” Opp. at 7-10.

2       Sonos contends that it established pre-suit notice for the '033 and '966 patents by providing  
3 Google with a draft complaint the day before it was filed, and for the '885 patent by providing  
4 Google with a draft of the amended complaint in connection with the meet-and-confer on Sonos's  
5 motion for leave to add the '885 patent. *Id.* at 13. But Sonos did not send the draft complaints to  
6 Google in an attempt to negotiate a resolution of the dispute. Sonos sent the drafts to create a claim.  
7 Indeed, Sonos had ***already alleged*** that Google was infringing willfully when it sent Google the  
8 drafts, and included the date the draft was sent as the alleged notice date. *See* Dkt. Nos. 39 at 3, 39-  
9 1 ¶¶ 137, 140; *Google v. Sonos*, No. 3:20-cv-06754-WHA, Dkt. No. 11-1 ¶¶ 95, 98, 120, 123.  
10 Sonos' additional arguments to manufacture pre-suit knowledge of the '033, '966, and '885 patents  
11 are similarly without merit.

12       ***First***, Sonos contends that the draft complaints establish pre-suit notice because “[t]here is  
13 nothing in the law that says that knowledge ‘doesn’t count’ if it was obtained in a meet and confer  
14 or close to when the complaint was filed.” Opp. at 14. However, Sonos fails to cite a single case  
15 in support of this proposition and ignores the cases Google cited in its Motion that granted a motion  
16 to dismiss under these circumstances. *See* Mot. at 12-13 (citing cases).

17       As Google explained in its motion, adopting Sonos's position would render the pre-suit  
18 notice requirement meaningless. *Id.* If pre-suit notice can be established by sharing a draft of a  
19 complaint at any time before filing, plaintiffs could allege willfulness by sending a draft complaint  
20 minutes or hours before filing suit. And if the knowledge requirement of a willfulness claim could  
21 be satisfied by sharing a copy of an amended complaint sent during a meet and confer, virtually any  
22 amended complaint could give rise to a claim for willfulness.

23  
24  
25 (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). “Extraneous material,  
26 however, is allowed on a Rule 12 motion in two instances: Judicial notice under FRE 201 and the  
27 incorporation-by-reference doctrine.” *Id.* (citing *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d  
28 988, 998 (9th Cir. 2018)). Here, Sonos has not moved for judicial notice of the exhibits and many  
of the exhibits are not even referenced in the SAC. *See* Dkt. No. 144-1. Specifically, the SAC does  
not refer to Ex. B (January 31, 2018 email and attachment) or Ex. D (June 11, 2019 email and  
attachment). *See* SAC.



1 Sonos responds that Google’s position “seems strange” because “[p]resumably, the Court  
 2 would want to encourage plaintiffs to meet and confer with defendants in advance of filing claims  
 3 for infringement.” Opp. at 14 n.4. But it is customary for a plaintiff to provide a defendant with a  
 4 copy of the amended complaint during the meet-and-confer process on a motion for leave to amend.  
 5 If this copy of the complaint constitutes pre-suit notice, then any defendant could allege, as Sonos  
 6 does here, that the defendant willfully infringes simply because (1) it had pre-suit knowledge of the  
 7 patent based on the copy of the amended complaint sent during the meet and confer; (2) after  
 8 receiving the allegations of infringement in the amended complaint the defendant knew or should  
 9 have known of the alleged infringement; and (3) defendant continued to sell its products. If these  
 10 allegations are found to be sufficient, defendants will face willful infringement allegations merely  
 11 because they participated in court-mandated meet-and-confer discussions. The Court should not  
 12 permit these types of litigation tactics.

13 **Second**, Sonos asks the Court to bless its pre-suit notice allegations because Google “filed  
 14 its own complaint for declaratory judgment *before* Sonos filed [its complaint in the Western District  
 15 of Texas].” Opp. at 14 (emphasis in original).<sup>4</sup> But Sonos’s argument that Google could become a  
 16 willful infringer in one day is inconsistent with the representations it made in its motion to dismiss  
 17 Google’s declaratory judgment complaint, where it argued that there was “literally no way” Google  
 18 could have investigated Sonos’s claims within one day. *Google v. Sonos*, No. 3:20-cv-06754-WHA,  
 19 Dkt. No. 11 at 7-8. Further, to the extent Google’s declaratory judgment complaint is relevant at  
 20 all, it cuts against willfulness because it shows Google has a good faith basis to believe it does not  
 21 infringe. In other words, Google did not ignore a risk of infringement—it promptly addressed it.

22 Sonos cites *Evolved Wireless, LLC v. Samsung Elecs. Co.* for the proposition that “Google  
 23 clearly had enough time to review and respond” to the draft complaint. Opp. at 14. But Sonos’s  
 24 argument mischaracterizes *Evolved*, which found that a letter sent “fifty-two days” prior to the filing  
 25

26 <sup>4</sup> Sonos also re-raises the Court’s finding that “Google’s choice of forum carrie[d] no weight”  
 27 because “the manifest purpose of Google’s suit was to beat the clock and defeat the patent owner’s  
 28 choice of venue.” Opp. at 5. As the Court will recall, the Federal Circuit roundly rejected Sonos’s  
 choice of venue, finding instead that “the center of gravity of this action is clearly in the [Northern  
 District of California], not in the Western District of Texas.” Dkt. No. 116 at 15.

1 of the lawsuit provided enough time to form a response. No. CV 15-545-SLR-SRF, 2016  
 2 WL1019667, \*4 (D. Del Mar. 15, 2016). The court contrasted this with a letter or complaint sent  
 3 “one day” before, which the court concluded would not be sufficient because a defendant cannot  
 4 take any action to avoid alleged infringement in one day. *Id.*

5 Sonos also relies on a pre-*Halo* case, *Mitutoyo Corp. v. Cent. Purchasing, LLC*, for the  
 6 proposition that Google’s declaratory judgment action establishes pre-suit notice. Opp. at 15 (citing  
 7 499 F.3d 1284 (Fed. Cir. 2007)). But Sonos neglects to mention that the patent owner in *Mitutoyo*  
 8 filed its infringement action ***eight years*** after the alleged infringer filed a declaratory judgment for  
 9 invalidity of the same patent and ***nine years*** after the parties entered into a settlement agreement  
 10 resolving a dispute about the same patent. 499 F.3d at 1287, 1290.

11 ***Third***, Sonos suggests that Google should be deemed to have “five months” of notice of the  
 12 ’033 and ’966 patents and “five weeks” of notice of the ’885 patent because the operative complaint  
 13 is the SAC. Opp. at 15. Sonos’s argument is contrary to law. *See ZapFraud*, 528 F. Supp. 3d at  
 14 252 (a plaintiff cannot plead willfulness “where defendant’s knowledge is based solely on the  
 15 content of that complaint or a prior version of the complaint filed in the same lawsuit”). Sonos’s  
 16 argument also defies logic because it would permit plaintiffs to establish pre-suit knowledge by  
 17 simply amending their complaint after filing. For example, Plaintiffs could create pre-suit notice  
 18 by filing a complaint and amending their complaint as a matter of right under Fed. R. Civ. P.  
 19 15(a)(1)(A) to allege pre-suit notice based on the original complaint.

20 In addition, Sonos mischaracterizes the cases it relies on for support. Opp. at 15-16.  
 21 *Illumina* expressly held that “[t]o state a claim for willful infringement, a patentee must allege that  
 22 the accused infringer had knowledge of the patent ***prior*** to filing the lawsuit.” *Illumina, Inc. v. BGI*  
 23 *Genomics Co.*, No. 19-CV-03770-WHO, 2020 WL 571030, at \*6 (N.D. Cal. Feb. 5, 2020)  
 24 (emphasis added) (permitting induced infringement claim to proceed based on post-suit knowledge  
 25 but dismissing willful infringement claim). Moreover, *MasterObjects* did not find that the patent  
 26 owner sufficiently alleged post-suit willfulness simply because “the original complaint gave notice”  
 27 as Sonos suggests. Opp. at 15-16. In *MasterObjects*, this Court observed that “[w]hile the Court of  
 28 Appeals for the Federal Circuit has recognized that post-suit misconduct can support a claim for

1 enhanced damages, . . . willfulness requires pleading more than knowledge of the patent and direct  
 2 infringement — *it requires a specific intent to infringe.*” *MasterObjects, Inc. v. Amazon.com, Inc.*,  
 3 No. C 20-08103 WHA, 2021 WL 4685306, at \*6 (N.D. Cal. Oct. 7, 2021) (emphasis added). Thus,  
 4 the Court found post-suit willfulness because “the totality of allegations of post-suit misconduct  
 5 make it reasonable to infer that [alleged infringer’s] infringement is intentional.” *Id.*

6 ***Fourth***, Sonos wrongly argues that Google’s cases are distinguishable. Sonos argues that  
 7 *Orlando* is distinguishable because the copy of the complaint Sonos provided to Google was “far  
 8 more detailed” than the plaintiff’s letter in *Orlando*. Opp. at 16. But *Orlando*’s conclusion that pre-  
 9 suit knowledge was lacking did not rest on the amount of detail in the plaintiff’s letter. *Orlando*  
 10 *Commc’ns LLC v. LG Elecs., Inc.*, No. 6:14-cv-1017-Orl-22KRS, 2015 WL 1246500, at \*11-12  
 11 (M.D. Fla. Mar. 16, 2015). It rested on its timing: “The Court is not convinced that sending a letter  
 12 merely one day before filing a lawsuit confers on a defendant the requisite knowledge.” *Id.* Sonos  
 13 similarly argues that *Evolved* and *Intellectual Ventures* are distinguishable because they involved a  
 14 different level of notice (Opp. at 16), but independent of any discussion regarding the sufficiency of  
 15 the notice, both cases held that providing notice one day before filing the complaint is insufficient.  
 16 *Evolved Wireless, LLC v. Samsung Elecs. Co.*, No. CV 15-545-SLR-SRF, 2016 WL 1019667, at \*4  
 17 (D. Del. Mar. 15, 2016) (addressing “timing argument” separate from substance of notice letter);  
 18 *Intellectual Ventures I LLC v. Toshiba Corp.*, 66 F. Supp. 3d 495, 499-500 (D. Del. 2014) (“notice  
 19 of the infringement risk via the letter written only one day before” is insufficient).

20 ***Fifth***, Sonos argues in the alternative that “Google was willfully blind to the existence of the  
 21 asserted patents well before Sonos filed suit, as well as to Google’s infringement of them.” Opp. at  
 22 16. Recognizing the insufficiency of the SAC’s willful blindness allegations, Sonos’s argument  
 23 stretches outside of the SAC and improperly relies on exhibits not subject to judicial notice and  
 24 events not referenced in the SAC. *See* Mot. at 16-17 n. 3; Opp. at 16-17; n.1 *supra*. Specifically,  
 25 Sonos asserts that Google was willfully blind to the ’033, ’966, and ’885 patents because “Sonos  
 26 engaged in extensive discussions with Google concerning the families of the three challenged  
 27 patents and Sonos repeatedly put Google on notice of multiple family members of each of them in  
 28 the years leading up to this action.” Opp. at 17. Needless to say, given that Sonos is attempting to

1 rely on discussions of *other* patents besides the asserted patents, Sonos did not put Google on notice  
 2 of the asserted patents. And in addition to being improper on a motion to dismiss, this argument  
 3 ignores that discussion of a patent family or portfolio does not support a finding of willful blindness.  
 4 See *MasterObjects*, 2021 WL 4685306, at \*6; *Finjan, Inc. v. Juniper Networks, Inc.*, No. C 17-  
 5 05659 WHA, 2018 WL 905909, at \*3-4 (N.D. Cal. Feb. 14, 2018). It also mischaracterizes the case  
 6 law. Sonos claims that a finding of willful blindness is warranted here because like in  
 7 *Corephotonics, Ltd. v. Apple, Inc.*, Google’s “prior knowledge of [Sonos’s] technology” and “its  
 8 conduct during negotiations with [Sonos]” suggest that Google “knew of at least a high risk that it  
 9 was infringing.” Opp. at 17 (quoting No. 17-CV-06457-LHK, 2018 WL 4772340, at \*9 (N.D. Cal.  
 10 Oct. 1, 2018)). However, the facts in *Corephotonics* are distinguishable from the facts here. In that  
 11 case, the patent owner “offered to share its patents with [the alleged infringer]’s technical and  
 12 business personnel” and the alleged infringer sent the patent owner an email stating “[p]lease do not  
 13 send any patents to us until further notice” in response. *Id.* But in this case, Sonos made no offer  
 14 to share ’033, ’966, and ’885 patents with Google, and Sonos does not allege that Google took  
 15 deliberate action to avoid learning of the ’033, ’966, and ’885 patents.

## 16 **2. Sonos Fails To Sufficiently Allege Egregious Conduct**

17 Sonos selectively cites two cases from Judge Chhabria for its argument that “[f]ollowing  
 18 *Eko*, courts in this district have held that a patentee does not need to plead facts showing egregious  
 19 misconduct to state a claim for willful infringement.” Opp. at 17-18 (citing *AllRounds, Inc. v.*  
 20 *eShares, Inc.*, No. 20-CV-07083-VC, 2021 WL 5195099, at \*1 (N.D. Cal. Nov. 9, 2021) (citing *Eko*  
 21 *Brands, LLC v. Adrian Rivera Maynez Enterprises, Inc.*, 946 F.3d 1367, 1378 (Fed. Cir. 2020));  
 22 *Core Optical Techs., LLC v. Juniper Networks Inc.*, No. 21- CV-02428-VC, 2021 WL 4618011, at  
 23 \*3 (N.D. Cal. Oct. 7, 2021) (same)).<sup>5</sup> While it may be true that Judge Chhabria has held that patent  
 24 owners do not need to plead egregious conduct to establish willful infringement, other courts in this

25  
 26 <sup>5</sup> Sonos also cites three cases from outside this district for the same proposition. Opp. at 18 (citing  
 27 *Shire ViroPharma Inc. v. CSL Behring LLC*, No. CV 17-414, 2018 WL 326406, at \*3 (D. Del. Jan.  
 28 8, 2018); *Longhorn Vaccines & Diagnostics, LLC v. Spectrum Sols. LLC*, No. 220-CV-00827-DBB-  
 JCB, 2021 WL 4324508, at \*13 (D. Utah Sept. 23, 2021); *IOENGINE, LLC v. PayPal Holdings,*  
*Inc.*, No. CV 18-452-WCB, 2019 WL 330515, at \*7 (D. Del. Jan. 25, 2019)).

1 district, including this Court, require allegations of egregious conduct to survive a motion to dismiss.  
 2 *See, e.g., Fortinet, Inc. v. Forescout Techs., Inc.*, No. 20-CV-03343-EMC, 2021 WL 2412995, at  
 3 \*19 (N.D. Cal. June 14, 2021); *NantWorks, LLC v. Niantic, Inc.*, No. 20-CV-06262-LB, 2021 WL  
 4 24850, at \*8 (N.D. Cal. Jan. 4, 2021); *Google LLC v. Princeps Interface Techs. LLC*, No. 19-CV-  
 5 06566-EMC, 2020 WL 1478352, at \*2 (N.D. Cal. Mar. 26, 2020); *Apple Inc. v. Princeps Interface*  
 6 *Techs. LLC*, No. 19-CV-06352-EMC, 2020 WL 1478350, at \*2 (N.D. Cal. Mar. 26, 2020); *Fluidigm*  
 7 *Corp. v. IONpath, Inc.*, No. C 19-05639 WHA, 2020 WL 408988, at \*5 (N.D. Cal. Jan. 24, 2020).

8 In any event, Sonos has neither pled facts showing egregiousness *nor* facts showing that  
 9 Google knew, or should have known, that its conduct amounted to infringement of the '033, '966,  
 10 and '885 patents. Sonos lists eight allegations that it contends satisfy the egregiousness requirement.  
 11 Opp. at 19. Most are facially implausible and none are legally sufficient. Allegations (1) to (4)  
 12 relate to collaborations and discussions between the parties that took place *before any of the three*  
 13 *relevant patents issued* and well before Sonos claims it provided Google with notice.<sup>6</sup> Opp. at 19  
 14 (citing SAC ¶¶ 12-29, 39). Sonos cannot show Google knew or should have known that its conduct  
 15 would infringe patents that did not yet exist and for which Sonos had not yet provided notice—let  
 16 alone that this conduct was egregious. Allegations (5) and (6) merely contend that Google received  
 17 a copy of the complaint and continued to sell products. *Id.* As discussed above, the authority Google  
 18 cited in its Motion (and that Sonos ignored) rejects these types of allegations as “ill-suited” for  
 19 pleading willfulness. Mot. at 11-14. Allegation (7) vaguely asserts that Google’s infringement is  
 20 part of a strategy to “vacuum up invaluable consumer data” without any specific allegations about  
 21 Google’s knowledge of patents, and allegation (8) is not even directed at the patents at issue here,  
 22 but rather different patents from different litigations. Opp. at 19.

23 Sonos also suggests that this is not a “garden variety” patent case because “the International  
 24 Trade Commission recently [found] that the same accused products here infringe five different  
 25 Sonos patents.” *Id.* But the International Trade Commission did not find that Google infringed  
 26

27 <sup>6</sup> As mentioned, the '885 patent did not issue until two months after the initial complaint was filed  
 28 in this case. The '966 patent issued on Nov. 5, 2019 and the '033 patent issued on Sept. 15, 2020—  
 14 days before the initial complaint was filed.

1 Sonos's patents *willfully*. Even if it had, a finding as to different Sonos patents, not asserted here,  
 2 has no bearing on whether Sonos has sufficiently plead that Google willfully infringed the patents-  
 3 in-suit in this case.

4 **B. Sonos's Indirect Infringement Allegations Should Be Dismissed**

5 Sonos has not sufficiently alleged that Google had pre-suit knowledge of the '033, '966, and  
 6 '885 patents or of any alleged infringement. Accordingly, the Court should dismiss Sonos's indirect  
 7 infringement allegations to the extent premised on pre-suit conduct. Google also submits that  
 8 Sonos's failure to sufficiently allege pre-suit notice necessitates dismissal of its post-suit indirect  
 9 infringement claims. Although there is a split of authority on whether pre-suit knowledge is  
 10 necessary to sustain a claim for post-suit indirect infringement, Google's Motion demonstrated that  
 11 the reasoning and logic behind cases prohibiting the complaint from creating a cause of action for  
 12 indirect infringement are sound, and Sonos's opposition fails to rebut this. Sonos's SAC is also  
 13 devoid of non-conclusory allegations concerning specific intent to induce infringement and a lack  
 14 of substantial non-infringing uses. These deficiencies independently warrant dismissal.

15 **1. Sonos Fails To Sufficiently Allege Knowledge**

16 Sonos's indirect infringement allegations should be dismissed in their entirety for failure to  
 17 allege pre-suit knowledge. Google's Motion showed that decisions within this District regularly  
 18 distinguish between pre-suit and post-suit indirect infringement allegations. *See* Mot. at 17 (citing  
 19 *CAP Co., Ltd. v. McAfee, Inc.*, No. 14-cv-05068-JD, 2015 WL 3945875, at \*4 (N.D. Cal. June 26,  
 20 2015); *Radware, Ltd. v. A10 Networks, Inc.*, No. C-13-02021-RMW, 2013 WL 5373305, at \*2 (N.D.  
 21 Cal. Sept. 24, 2013); *Avocet Sports Tech., Inc. v. Garmin Int'l, Inc.*, No. C 11-04049 JW, 2012 WL  
 22 1030031, at \*4 (N.D. Cal. Mar. 22, 2012)). Here, Sonos's inadequate indirect infringement  
 23 allegations extend to both pre-suit and post-suit conduct. Opp. at 21-22.

24 *(a) Pre-Filing Conduct*

25 Sonos's SAC does not adequately allege pre-suit knowledge of the '033, '966, and '885  
 26 patents. In its Opposition, Sonos contends that it "did allege pre-suit knowledge." Opp. at 20. But  
 27 as explained above, the draft complaints are not sufficient to establish pre-suit knowledge of the  
 28 '033, '966 and '885 patents. Sonos also suggests that "[c]ourts in the Northern District of California



1 have held that knowledge of a patent based on the filing of a complaint is sufficient to meet the  
 2 knowledge requirement for an induced infringement claim.” *Id.* at 21. This argument misrepresents  
 3 the case law. *Skyworks* held that a complaint filed in another case ***nine months before*** the case at  
 4 issue established pre-suit knowledge. *Skyworks Sols., Inc. v. Kinetic Techs., Inc.*, No. 14-CV-00010-  
 5 SI, 2015 WL 881670, at \*1, \*8 (N.D. Cal. Mar. 2, 2015) (“Skyworks has shown Kinetic USA’s  
 6 actual knowledge of the patents-in-suit from the filing of the complaint in the Massachusetts  
 7 litigation”). *MasterObjects* did not even consider induced infringement. 2021 WL 4685306, at \*6.  
 8 And *Nanosys* and *Illumina* held that post-suit knowledge can support induced infringement, but only  
 9 for claims relating to ***post-suit*** conduct. *Nanosys, Inc. v. QD Vision, Inc.*, No. 16-CV-01957-YGR,  
 10 2016 WL 4943006, at \*5-6 (N.D. Cal. Sept. 16, 2016) (limiting induced infringement claims “to  
 11 post-suit actions because of plaintiffs’ failure to allege pre-suit knowledge adequately); *Illumina*,  
 12 2020 WL 571030, at \*7 (same).

13       If the Court finds that Sonos failed to allege pre-suit knowledge, Sonos does not dispute that  
 14 this failure warrants dismissal of indirect infringement allegations to the extent they are premised  
 15 on pre-suit conduct. *See* Opp. at 20-22. Indeed, the Northern District of California cases cited by  
 16 Sonos reveal that courts routinely limit indirect infringement claims lacking pre-suit knowledge to  
 17 post-filing conduct. *See Illumina*, 2020 WL 571030, at \*7 (finding that patent owner “may assert  
 18 post-suit knowledge to support its claims of induced infringement” even though it failed to establish  
 19 pre-suit knowledge); *Nanosys*, 2016 WL 4943006, at \*6 (concluding that patent owner’s induced  
 20 infringement claims were “limited to post-suit actions because of [its] failure to allege pre-suit  
 21 knowledge adequately”); *CAP*, 2015 WL 3945875, at \*5 (“[T]o the extent [the indirect infringement  
 22 claims] are otherwise properly alleged, they will be limited to post-filing conduct.”); *Skyworks*, 2014  
 23 WL 1339829, at \*3 (“[F]or a claim of induced infringement, knowledge of the patent can be  
 24 established through the filing of the complaint, but the claim for induced infringement is limited to  
 25 post-filing conduct.”). Accordingly, Sonos’s allegations of indirect infringement must be dismissed  
 26 to the extent premised on pre-suit conduct. *Everlight Elecs. Co. v. Bridgelux, Inc.*, 2018 WL  
 27 5606487, at \*4 (N.D. Cal. Sept. 14, 2018) (granting motion to dismiss “with respect to any pre-suit  
 28 conduct related to the indirect infringement claims”).

(b) *Post-Filing Conduct*

For the reasons already explained in Google’s Motion, the cases finding that pre-suit knowledge is required best comport with the principles underlying induced and contributory infringement. Mot. at 17-19. For example, requiring pre-suit notice ensures that a complaint cannot be used to create a cause of action and protects the differences between direct infringement, a strict liability violation, and indirect infringement, which requires a showing of intent on the part of the alleged infringer. *Id.* at 18. It also promotes pre-suit resolution by encouraging patent owners to put alleged infringers on notice before resorting to litigation. *Id.* Accordingly, Sonos’s allegations of indirect infringement should be dismissed in their entirety for failure to allege pre-suit knowledge.

**2. Sonos’s SAC Lacks Any Non-Conclusory Allegations Concerning Specific Intent**

Sonos’s SAC fails to allege the specific intent required to state a claim for induced infringement.<sup>7</sup> Mot. at 19-21. Sonos asserts that it “adequately pleaded that Google had specific intent to induce infringement” because it alleged that “Google intentionally advertised infringing Google products and encouraged its customers to ‘engage in activity that constitutes direct infringement.’” Opp. at 23-25 (citing SAC ¶¶ 93, 118, 131). This argument fails.

Specific intent exists where there is “[e]vidence of active steps taken to encourage direct infringement,” which can be found in “advertising an infringing use or instructing how to engage in an infringing use.” *Takeda Pharms. U.S.A., Inc. v. W.-Ward Pharm. Corp.*, 785 F.3d 625, 630-31 (Fed. Cir. 2015); *see also* Opp. at 23. But as the Federal Circuit and this Court have found, “[m]erely describ[ing]” an infringing use does not qualify as “recommend[ing],” “encourag[ing],” “promot[ing],” or “suggesting” infringement. *California Beach Co., LLC v. Exqline, Inc.*, No. C 20-01994 WHA, 2020 WL 6544457, at \*2 (N.D. Cal. Nov. 7, 2020) (citing *Takeda*, 785 F.3d 625, 631) (quotations and citations omitted); *see also Fluidigm*, 2020 WL 408988, at \*3. Thus, “vague

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<sup>7</sup> Sonos claims that the Court should decline to consider this argument and Google’s argument regarding Sonos’s failure to plead substantial non-infringing uses because Google did not include them in its précis request. Opp. at 22 n.7, 25 n.9. Sonos overstates the précis requirements. The Case Management Order requires the précis to “summariz[e] the proposed motion and explain[] how it will advance the resolution of the overall case.” *Google v. Sonos*, No. 3:20-cv-06754-WHA, Dkt. No. 67. It does not require a party to detail every basis of its motion.



1 and conclusory allegations that [an alleged infringer] ‘intentionally instructs its customers to  
 2 infringe’ using broad categories of materials, coupled with a list of . . . generic websites” are  
 3 insufficient to show specific intent. *Uniloc USA, Inc. v. Apple Inc.*, No. C 18-00359 WHA, 2018  
 4 WL 2047553, at \*4 (N.D. Cal. May 2, 2018). Likewise, the “ordinary provision of services” also  
 5 does not show specific intent. *California Beach Co.*, 2020 WL 6544457, at \*2 (emphasis in original).

6 In other words, it is not enough to assert, without factual support, that Google had the specific  
 7 intent to induce infringement because it provided instructions or encouragement to customers or end  
 8 users. But that is all that Sonos does. The SAC only alleges that Google “encourag[ed] . . .  
 9 customers and potential customers to engage in activity that constitutes direct infringement” by  
 10 advertising its products, supplying those products to consumers, and instructing consumers how to  
 11 use those products. Opp. at 23-24. Such “vague and conclusory allegations say nothing about what  
 12 specific material or site content allegedly induces infringement, or how.” *Uniloc*, 2018 WL  
 13 2047553, at \*5. Also, Sonos’s “perfunctory recitation of the elements of induced infringement fail  
 14 to provide factual support for the claim” because Sonos “has simply couched its legal conclusions  
 15 in the guise of factual allegations, which *Twombly* and *Iqbal* soundly rejected.” *People.ai, Inc. v.*  
 16 *SetSail Techs., Inc.*, No. C 20-09148 WHA, 2021 WL 2333880, at \*6 (N.D. Cal. June 8, 2021).

17 Sonos cites several decisions purporting to find that a passing reference to instruction  
 18 manuals and product literature suffices to give rise to a plausible inference of specific intent. Opp.  
 19 at 23-24 (citing *Teradata US, Inc. v. SAP SE*, No. 20-CV-06127-WHO, 2021 WL 326930, at \*7  
 20 (N.D. Cal. Feb. 1, 2021); *Illumina*, 2020 WL 571030, at \*6; *Radware*, 2013 WL 5373305, at \*6;  
 21 *Symantec Corp. v. Veeam Software Corp.*, No. C 12-00700 SI, 2012 WL 1965832, at \*5 (N.D. Cal.  
 22 May 31, 2012)). However, Google respectfully submits that those decisions are neither binding nor  
 23 persuasive. “[T]he specific intent necessary to induce infringement ‘requires more than just intent  
 24 to cause the acts that produce direct infringement.’” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*,  
 25 545 F.3d 1340, 1354 (Fed. Cir. 2008) (quoting *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306  
 26 (Fed. Cir. 2006)). “The inducer must have an affirmative *intent to cause direct infringement*.” *Id.*  
 27 (emphasis added) (citation omitted). Merely alleging that a defendant provides instructions and  
 28 manuals describing generally how to use its products does not give rise to a plausible inference that

1 it intends to cause direct infringement. Rather, without more, the distribution of instructions and  
 2 manuals suggests only that a defendant intends to instruct its customers about the operation of its  
 3 products. “When faced with two possible explanations, only one of which can be true and only one  
 4 of which results in liability, plaintiffs cannot offer allegations that are ‘merely consistent with’ their  
 5 favored explanation but are also consistent with the alternative explanation.” *In re Century*  
 6 *Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S.  
 7 662, 678 (2009)); *see also Fluidigm*, 2020 WL 408988, at \*3 (“Indeed, the Supreme Court  
 8 emphasized in both *Twombly* and *Iqbal* that allegations of conduct ‘merely consistent with’ liability  
 9 are not enough.”).<sup>8</sup> Instead “[s]omething more is needed, such as facts tending to exclude the  
 10 possibility that the alternative explanation is true, . . . in order to render plaintiffs’ allegations  
 11 plausible.” *In re Century Aluminum*, 729 F.3d at 1108. Although a patentee “need not cite  
 12 statements from the accused infringer specifically instructing the direct infringer ‘to perform all of  
 13 the steps of the patented method,’” mere “passing references” to user manuals and promotional  
 14 materials, “without ever saying what those materials contain, . . . [are] wholly inadequate for an  
 15 inference of specific intent.” *CAP*, 2015 WL 3945875, at \*5 (citation omitted); *see also In re Bill of*  
 16 *Lading*, 681 F.3d 1323, 1339 (Fed. Cir. 2012) (requiring a plausible allegation of specific intent).

### 17                   3.       **Sonos Cannot Rely on Mere Recitations of the Legal Standard to** **Establish A Lack Of Substantial Non-Infringing Uses**

18           Google’s Motion demonstrated that the SAC only relies on threadbare recitals of the  
 19 elements of a contributory infringement claim, and must therefore be dismissed. Mot. at 21-22.  
 20 Sonos disputes that characterization, claiming that the SAC “contains specific and detailed  
 21 allegations saying how the patents are infringed, saying expressly that that functionality is  
 22 specifically adapted for infringement, and alleging that there are no other uses for the specific  
 23 software that provides the accused functions which don’t infringe.” Opp. at 26-27. But as Sonos’s  
 24 own case explains, to allege contributory infringement, plaintiffs “*must allege some facts* that take  
 25 its statements from mere lawyerly fiat to a plausible conclusion.” *Id.* at 25 (citing *Software Rsch.*,  
 26

27 \_\_\_\_\_  
 28 <sup>8</sup> In reviewing motions to dismiss, the Federal Circuit applies the law of the regional circuit. *Lyda*  
*v. CBS Corp.*, 838 F.3d 1331, 1337 (Fed. Cir. 2016).

1 *Inc. v. Dynatrace LLC*, 316 F. Supp. 3d 1112, 1136 (N.D. Cal. 2018) (emphasis added)). A plaintiff  
 2 cannot simply rely upon a “formulaic recitation of elements.” *Uniloc*, 2018 WL 2047553, at \*5.  
 3 Instead, a plaintiff must present some “factual underpinnings” to support a plausible inference that  
 4 the products are not a staple article of commerce capable of substantial non-infringing use. *Uniloc*  
 5 *USA, Inc. v. Logitech, Inc.*, 2018 WL 6025597, at \*3 (N.D. Cal. Nov. 17, 2018).

6 Despite Sonos’s assertions to the contrary, the SAC merely paraphrases the contributory  
 7 infringement statute. For example, Sonos alleges that “Google offers for sale, sells, and/or imports,  
 8 in connection with the [the accused product], one or more material components of the invention of  
 9 the . . . Patent that are not staple articles of commerce suitable for substantial noninfringing use.”  
 10 SAC ¶¶ 94 (’033 patent), 119 (’966 patent), 132 (’885 patent). This is a conclusory rephrasing of  
 11 the contributory infringement statute. *See* 35 U.S.C. § 271(c) (“Whoever . . . sells within the United  
 12 States . . . a component of a patented machine . . . constituting a material part of the invention,  
 13 knowing the same to be especially made or especially adapted for use in an infringement of such  
 14 patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use,  
 15 shall be liable as a contributory infringer.”). Merely alleging that the accused products include  
 16 certain functionality, and asserting without factual support that the functionality is ‘material,’ does  
 17 not give rise to a plausible inference that the accused products “could not be used ‘for purposes  
 18 other than infringement.’” *See Artrip v. Ball Corp.*, 735 F. App’x 708, 713 (Fed. Cir. 2018) (quoting  
 19 *Bill of Lading*, 681 F.3d at 1338); *cf. Firstface Co. v. Apple, Inc.*, 2019 WL1102374, at \*2 (N.D.  
 20 Cal. Mar. 8, 2019) (denying motion to dismiss because complaint “specifie[d] *how* these features  
 21 on iPhones and iPads are central to the devices’ operation” (emphasis added)).

22 The cases Sonos cites for support do not compel a different outcome. While Sonos claims  
 23 that “the Federal Circuit and courts in this district have refused to dismiss similarly pleaded  
 24 contributory infringement claims,” Sonos fails to mention that the plaintiffs in those cases pled **facts**  
 25 supporting an inference of substantial non-infringing use. *Opp.* at 27. In *Nalco*, the plaintiff  
 26 “explicitly pled facts to show . . . that [the accused products] were especially made or adapted for  
 27 infringing it.” *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1357 (Fed. Cir. 2018). In *Firstface*,  
 28 the plaintiff “specifie[d] how these features on iPhones and iPads are central to the devices’

operation.” *Firstface*, 2019 WL 1102374, at \*2. In *Fortinet*, the plaintiff “identifie[d] the specific ‘component’ of each accused product that is alleged to infringe.” *Fortinet, Inc. v. Forescout Techs., Inc.*, No. 20-CV-03343-EMC, 2021 WL 2412995, at \*18 (N.D. Cal. June 14, 2021). In *ScaleMP*, the plaintiff made “detailed allegations.” *ScaleMP, Inc. v. TidalScale, Inc.*, No. 18-CV-04716-EDL, 2019 WL 7877939, at \*4 (N.D. Cal. Mar. 6, 2019). And in *Core Optical*, the plaintiff described how the accused devices were especially adapted to perform the claimed methods. *See Core Optical Techs., LLC v. Juniper Networks Inc.*, No. 21-CV-02428-VC, 2021 WL 4618011, at \*4 (N.D. Cal. Oct. 7, 2021) (citing *Core Optical Technologies, LLC v. Juniper Networks, Inc.*, No. 3:21-cv-02428-VC, Dkt. No. 84 (Third Amended Complaint) ¶ 111. Unlike the plaintiffs in each of these cases, Sonos merely recites the elements of a contributory infringement claim without supporting factual allegations. Sonos has failed to meet its pleading burden and its claims for contributory infringement should be dismissed for failure to allege a lack of substantial non-infringing uses.

### C. Dismissal of Sonos’s Claims Should Be With Prejudice

Contrary to Sonos’s assertions, dismissal with prejudice is warranted because further amendment would be futile. First, Sonos has failed to properly allege willful and indirect infringement despite two opportunities to amend.<sup>9</sup> *MasterObjects*, 2021 WL 4685306, at \*7 (amendment futile where plaintiff “twice amended its complaint”); *Polaris PowerLED Techs., LLC v. Vizio, Inc.*, No. SACV181571JVSDFMX, 2019 WL 3220016, at \*4 (C.D. Cal. May 7, 2019) (dismissing claims for willful and induced infringement with prejudice where operative pleading was plaintiff’s “third pleading attempt”). Second, Sonos has not “identif[ied] additional facts it would allege should [Google]’s motion be granted.” *Polaris*, 2019 WL 3220016, at \*4. Sonos generally claims that “there are further facts concerning Google’s willful (and willfully blind) infringement that Sonos can amend to allege in greater detail should the Court find it necessary.” Opp. at 27. But Sonos fails to specify which facts would cure its deficient allegations.

### III. CONCLUSION

For the foregoing reasons, Google requests that the Court grant its Motion.

<sup>9</sup> Sonos takes issue with this characterization. Opp. at 22. But it is accurate. Sonos has amended its complaint twice, and has failed to add further detail to its willful and indirect infringement claims.

1 DATED: January 31, 2022

QUINN EMANUEL URQUHART & SULLIVAN,  
LLP

3 By /s/ Charles K. Verhoeven

4 Charles K. Verhoeven

5 Melissa Baily

Lindsay Cooper

6 Attorneys for GOOGLE, LLC

**CERTIFICATE OF SERVICE**

Pursuant to the Federal Rules of Civil Procedure and Local Rule 5-1, I hereby certify that, on January 31, 2022, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's CM/ECF system and email.

/s/ Charles K. Verhoeven  
Charles K. Verhoeven